EMPORIUM JAYA (BENTONG) SDN BHD (IN LIQUIDATION)

v.

EMPORIUM JAYA (JERANTUT) SDN BHD

HIGH COURT MALAYA, TEMERLOH
RAMLY ALI JC
[COMPANIES (WINDING-UP) NO: 28-4-2001]
28 SEPTEMBER 2001

COMPANY LAW: *Winding-up - Attachment of property - Whether within ambit of s. 224 Companies Act 1965*

COMPANY LAW: *Winding-up - Liquidator - Application for - Whether ex parte application may be made for appointment of provisional liquidator - Whether service of application necessary - Whether there was non-disclosure of material facts - Whether sufficient prima facie evidence to support appointment of liquidator under s. 231 Companies Act 1965*

COMPANY LAW: *Winding-up - Liquidator - Application by judgment creditors to set aside ex parte order for appointment of provisional liquidator - Whether ex parte order a nullity on procedural grounds - Merits of the case - Whether petitioner and judgment creditors had respective locus standi to present and to oppose petition - Whether petition a nullity for non-compliance with r. 26 Companies (Winding-Up) Rules 1972 - Balance of convenience and justice of the case*

The petitioner, through its liquidator, presented a winding up petition against the respondent on the grounds that the respondent was unable to pay its debts and thus it would be just and equitable for the respondent to be wound up pursuant to s. 218(1)(i)(e) of the Companies Act 1965 ('the Act'). The petitioner also simultaneously filed an *ex parte* application (encl. 3) supported by the liquidator's affidavit (encl. 4) and a certificate of urgency (encl. 2) praying *inter alia* for an order that further civil actions against the respondent and the auction of the respondent's properties that were seized in the attachment-before-proceedings taken out by its creditors, the applicants herein ('the applicants'), be stayed pursuant to ss. 222, 223 and 224 of the Act, pending the hearing of the petition. By the said application (encl. 3), the petitioner also sought the appointment of its liquidator under s. 231 of the Act, and for the liquidator to take possession, control and protect the assets or realise such assets and to prevent the distribution or parting thereof until further notice. An order in terms of the said application ('the *ex parte* order') was granted.

The respective applicants in the instant applications (encls. 14, 18 and 22) sought to set aside the *ex parte* order on the basis that the said order could not be sustained on its merits and was a nullity on the following procedural grounds: (i) that there was no proper, valid and effective petition before the court to wind up the respondent; (ii) that the petition was a nullity and consequently all subsequent proceedings thereunder including the *ex parte* order were also a nullity; (iii) that there were no provisions under the Act and/or under the Companies (Winding-Up) Rules 1972 ('the Winding-Up Rules') for an *ex parte* application to be made; and (d) that the liquidator had failed to make a full and frank disclosure of the material facts in his affidavit (encl. 4) to support his application (encl. 3).

On the merits of the case, the applicants submitted that: (i) the petitioner had not made out a case under ss. 217 and 218 of the Act to present a winding up petition; (ii) that the applicants' attachment-before-judgment of the respondent's goods pursuant to an order of court was valid and that ss. 224 and 293 of the Act were inapplicable; and (c) that ss. 223, 224, 292, 293, 297, 298 and 299 of the Act were not applicable to protect the petitioner.

The issues before the court were: (i) whether the petitioner and the applicants had the *locus standi* to present and to oppose the petition respectively; (ii) whether the petition was a nullity for non-compliance with r. 26 of the Winding-Up Rules; (iii) whether an *ex parte* application could be made under the Act for the appointment of a provisional liquidator; (iv) whether the application (encl. 3) ought to have been served on the applicants; (v) whether there was a failure by the liquidator to disclose material facts relevant to the case in his affidavit (encl. 4); (vi) whether s. 218(1)(e) must be read together with ss. 218(2)(a), (b) and (c) of the Act; (vii) whether there was sufficient *prima facie* evidence in this case to support the appointment of a provisional liquidator under s. 231 of the Act; (viii) whether the attachment and execution proceedingss taken out by the applicants fall within the ambit of ss. 224 of the Act and whether s. 224 of the Act could be invoked where execution had started before the presentation of the petition but was never completed at the time of the presentation of the petition; (ix) whether in the circumstances of this case, the provisions of ss. 298(1) and 299(3) of the Act may be invoked by the court; and (x) whether the balance of convenience and justice of the case warranted the grant of the *ex parte* order.

Held:

[1] Although a petitioner cannot claim to be a creditor when the debt in question is seriously and substantially disputed, it is imperative that for this principle to apply, the debt in question must be disputed by the company on some cogent and substantial grounds. The dispute must necessarily emanate from the respondent itself as it would be in the best position to raise any *bona fide* and substantial dispute as to the debt. The alleged dispute in this instance was raised by the applicants, who were creditors of the respondent, without the benefit of any knowledge of the events leading to the creation of the alleged debt due to the petitioner. The dispute as raised by the applicants, therefore, was trivial, unsubstantial and neither *bona fide* nor based on cogent grounds and thus should be ignored by the court. In the circumstances, and for the purpose of s. 217(1)(b) of the Act, the petitioner qualified as a creditor and had the necessary *locus* to petition for the respondent's winding up. (p 22 e)

[1a] It was plain and obvious that the effect of the *ex parte* order would be to stay the scheduled auction and that the petition against the respondent, if it were valid and successful, would seriously hamper the applicants' attempt to realize their respective debts from the respondent. The applicants in the circumstances, had valid interest on the subject matter of the winding up and therefore possessed the *locus standi* to oppose the petition and to apply to set aside the said *ex parte* order. (pp 22 f, h & 23 b)

[2] Rule 26 of the Winding-up Rules requires that the affidavit verifying the petition shall be sworn and filed within the four days after the presentation of the petition, and shall be *prima facie* evidence of the statements in the petition. In this instance, the affidavit verifying the petition (encl. 1) was filed on the fifth day after the presentation of the petition, *ie*, one day outside the prescribed time. Such a delay was not serious and no substantial injustice was caused to the other parties. At most, the one-day delay would be considered as an irregularity which was curable under r. 194(1) of the Winding-Up Rules. (pp 24 e & 25 b-c)

[3] The court has the inherent jurisdiction and is clearly empowered by s. 231 of the Act to appoint an official receiver or an approved liquidator provisionally at any time after the presentation of a winding-up petition and before the making of a winding-up order. The applicants' contention to the contrary had no merit. (p 25 f-g)

[3a] In the instant case, there was *prima facie* evidence in the affidavit in support of the application (encl. 4) to underline the urgency of the matter. The appointment of a provisional liquidator in the circumstances was necessary to prevent undue preference among the creditors and to prevent the unfair distribution of the respondent's assets as well as to prevent the multiplicity of court proceedings and save judicial time. (p 26 d, e & g)

[4] The petitioner had tendered substantive and cogent evidence to support the fact that the delay in effecting service or giving notice of the application to all the related parties was likely to frustrate and defeat the purpose of the application. In the premise, and bearing in mind that the petitioner had given the usual undertaking as to damages, there was no need for the application (encl. 3) to have been served on the respondent as well as on every person against whom the *ex parte* order was sought, as required under r. 7(2) of the Winding-Up Rules. (pp 26 i & 27 a-b)

[5] As a rule, the failure of a petitioner to make a full and frank disclosure of all relevant or material facts in its *ex parte* application will empower the court to set aside the *ex parte* order. On the facts, the "undisclosed facts" as alleged by the applicants were neither material nor relevant in the context of the other materials before the court at the stage of the *ex parte* application. The alleged "undisclosed facts" were not really essential in determining the issue on the appointment of a provisional liquidator. All material and relevant facts for consideration were stated in the liquidator's affidavit in support of the petitioner's application. The question of the petitioner having suppressed material evidence in the said affidavit did not arise. (pp 27 h-i & 28 e-g)

[6] The ground that the respondent was unable to pay its debt under s. 218(1)(e) of the Act could be invoked by the petitioner proving the same by positive and direct evidence during the hearing of the petition or, alternatively, the petitioner could rely on the statutory presumption provided under s. 218(2)(a), (b) and (c) of the Act. Should the petitioner choose to prove its case by positive and direct evidence during the hearing of the petition, then the question of complying with the requirements of s. 218(2)(a), (b) and (c) of the Act would not arise. Should the petitioner choose to rely on the statutory presumption under s. 218(2) of the Act, then the petitioner need only rely on either provisions (a), (b) or (c) thereto and not on all of the said provisions. Section 218(a), (b) and (c) of the Act are mutually exclusive and the court in the exercise of its discretion, can wind up a company on any one of the grounds therein. (p 29 b-e)

[6a] A petitioner is at liberty to choose any one or more of the grounds for winding up as specified in the Act. There is nothing in the law to say that a petitioner can rely on only one ground and not more. (p 30 e-f)

[7] The court's appointment of a provisional liquidator under s. 231 of the Act is consequential upon the sufficiency of the allegations in the petition. The uncontested evidence taken as a whole must inevitably lead to the conclusion that it is imperative that a winding up order be made. In the instant case, considering the degree of urgency, the balance of convenience and the need established by the petitioner, there was more than sufficient *prima facie* evidence to support the appointment of a provisional liquidator. (pp 30 h & 31 a-d)

[8] Section 224 of the Act renders void any attachment, sequestration, distress or execution in force against the estate or effects of the company **after** the commencement of the winding up by the court. Unlike s. 223 of the Act, there is no validating power given to the court and the requirement under s. 224 is therefore mandatory. In this instance, the attachment of the respondent's property was in the nature of an execution of judgment or order of court and thus fell squarely within the ambit of s. 224 of the Act. Although the execution process had started before the presentation of the petition it was not completed when the petition was presented and the execution creditors could not therefore enjoy the benefits of the execution. (pp 32 h & 33 d & e)

[8a] The objective of s. 298 of the Act is to empower the liquidator to recover any dissipation of the assets of the company acquired by the creditor by way of attachment or execution before the commencement of the petition. This provision is only applicable if the company has been wound up and not prior to that. Accordingly in this instance, s. 298(1) of the Act could not be invoked at this stage of the proceedings. (p 35 e-f)

[8b] Section 299(3) of the Act being in *pari materia* with s. 298(1) of the Act confers upon the court the jurisdiction and discretion to do what is right and just subject to the circumstances of the case and subject to adherence to the basic scheme of the Act. The instant case was not a proper case for the court to exercise its discretion in favour of the applicants as it would be manifestly unjust and unreasonable to do so at the expense of the other unsecured creditors. (pp 35 g, 36 g & 38 a)

[8c] The primary intention of the Act is that in a winding up, the unsecured creditors rank *pari pasu* and an execution creditor who has not completed his execution at the commencement of the winding up should necessarily be in the same position as any other unsecured creditor. In this case, it would be in the interest of justice to allow the *ex parte* application pending the disposal of the petition against the respondent. (p 37 a-b)

[Applicants' applications vide encls. 14, 18 and 22 dismissed with costs.]

Case(s) referred to:

Armorduct Manufacturing Co Ltd v. General Incondescent Co Ltd [1911] 2 KB 143 ***(refd)***

Chatib Kari v. Mosbert Bhd [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 ***(refd)***

Chin Yoon Timber Co v. Overseas Lumber Bhd [1978] 2 MLJ 173 ***(refd)***

E Pritchard v. Westminster Bank Ltd [1969] 1 All ER 999 ***(refd)***

In re Overseas Ariation Engineering (GB) Ltd [1963] 1 Ch 24 ***(refd)***

In re Redman (Builders) Ltd [1964] 1 WLR 541 ***(refd)***

Jurupakat Sdn Bhd v. Kumpulan Good Earth (1973) Sdn Bhd [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618 ***(refd)***

Kok Fook Sang v. Juta Villa (M) Sdn Bhd & Ors [1997] 2 CLJ 116 ***(refd)***

Kong Long Huat Chemicals Sdn Bhd v. Raylee Industries Sdn Bhd [1998] 5 CLJ 310 ***(foll)***

Kredin Sdn Bhd v. Development and Commercial Bank Bhd [1995] 4 CLJ 19 ***(refd)***

Kumarasamy v. Hj Daud [1972] 2 MLJ 16 ***(refd)***

Mann & Anor v. Goldstein & Anor [1968] 1 WLR 1091 ***(refd)***

Mann & Anor v. Goldstein & Anor [1968] 2 All ER 769 ***(refd)***

Mark Jaya Engineering Sdn Bhd v. LFY Construction Sdn Bhd [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 ***(refd)***

Metal Reclamation (Industries) Sdn Bhd v. JRC Tenaga Sdn Bhd [2000] 6 CLJ 290 ***(refd)***

Morgan Guaranty Trust Co of New York v. Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 ***(refd)***

Official Receiver v. J Grind [1933] 7 FM SLR 48 ***(refd)***

Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd [1991] 3 CLJ 1836; [1991] 3 CLJ (Rep) 415 ***(refd)***

R v. Kensington Income Tax Commissioner, ex p Princes Polignac [1917] 1 KB 486 ***(refd)***

Re Clubs Mediterranean Pty Ltd [1975] 1 SASR 481 ***(refd)***

Re East Cambrian Gold Mining Co 12 LTR NS 507 ***(refd)***

Re Grosvenor Metal Co Ltd [1949] 2 All ER 948 ***(refd)***

Re Highfield Commodities Ltd [1985] 1 WLR 149 ***(refd)***

Re Lo Siong Fong [1994] 2 MLJ 72 ***(refd)***

Re London and Westminster Co-operative Store Co 17 LTR NS 559 ***(refd)***

Re Lympne Investment Ltd [1972] 2 All ER 385 ***(refd)***

Re Mc Lennan Holdings Pty Ltd [1983] 7 ACLR 732 ***(refd)***

Re Nima Travel Sdn Bhd [1986] 2 MLJ 374 ***(refd)***

Re North Bucks Furniture Depositories Ltd [1939] 2 All ER 549 ***(refd)***

Re Perdana Merchant Bankers Bhd [1997] 3 CLJ Supp 140 ***(refd)***
Re Suidair International Airways Ltd (in liquidation) [1950] 2 All ER 920 ***(refd)***
Re Welsh Brick Industries Ltd [1946] 2 All ER 197 ***(refd)***
South Downs Packers Pty Ltd v. Beaver [1984] 8 ACLR 990 ***(refd)***
Supreme Holdings Ltd v. The Sheriff, Supreme Court of Singapore [1987] 1 MLJ 10 ***(refd)***
Teck Yow Brothers Hand-Bag Trading Co v. Maharani Supermarket Sdn Bhd [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 ***(foll)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Ors [1996] 1 CLJ 393 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218(1)(e), (i), (2)(a), (b), (c), (e), (9)(a), 219(2), 221, 222, 223, 224, 226(3), (4), 231, 232, 233, 292, 293, 297, 298(1)(c), (2)(a), 299(1), (3)
Companies (Winding-Up) Rules 1972, rr. 5(2), 7(2), 11, 26, 193, 194(1)
Courts of Judicature Act 1964, s. 25(2)
Debtors Act 1957, s. 19

Other source(s) referred to:
Halsbury's Laws of Malaysia, vol 1, para 110.029
Mc Pherson, *Law of Company Liquidation,* 3rd edn, p 54
Pennington's Company Law, 1985, 5th edn, p 843

For the petitioner - Ong Ban Chai (KP Ng); M/s Ong Ban Chai & Co
For the applicants - Mogan Karuppiah (Fadzil Abdullah); M/s Mogan Karuppiah
For the opposing creditor - Sawindirjit Singh

Reported by K Ganesh

JUDGMENT

Ramly Ali JC:

On 17 August 2001, the petitioner, (Emporium Jaya (Bentong) Sdn. Bhd., (in liquidation)) presented a winding-up petition against the respondent, Emporium Jaya (Jerantut) Sdn. Bhd., at the Temerloh High Court *vide* Companies (Winding-Up) Petition No: 28-4-2001. The said petition was signed by one Mr. Koh Kheng Mm, the liquidator of the petitioner. The petitioner alleged that the respondent was indebted to the petitioner in the sum of RM18,133.68. The petitioner also alleged that on or about 14 August 2001, the petitioner was informed that an attachment-before-proceedings were taken against the respondent, of which the Bailiff of the Temerloh Session Court had taken possession and attached the business premises of the respondent at Wisma Emporium Jaya, Jalan Kuantan, Jerantut, Pahang. The date of auction has been fixed on 22 August 2001. So, in the petition, the petitioner verily believed that the respondent is insolvent and is unable to pay its debt. The petitioner prays that the respondent be wound up on the grounds that the respondent is unable to pay its debt (s. 218(1)(e) of the Companies Act 1965) and it is just and equitable that respondent be wound-up (s. 218(1)(i) of the same Act).

On the same day when the petition was presented (17 August 2001), the petitioner has also filed the following documents, namely:

(i) *Ex parte* summons in chambers (encl. 3);

(ii) Supporting affidavit of Koh Kheng Min (encl. 4); and

(iii) Certificate of urgency (encl. 2).

The said *ex parte* summons in chambers (encl. 3) prayed for the following orders:

(i) that Mr. Koh Kheng Min of Messrs Koh & Associates, an approved liquidator be appointed a provisional liquidator of the respondent company under s. 231 of the Companies Act 1965;

(ii) that the provisional liquidator to take possession, control and protect the assets or realise the assets of the respondent company and such assets are not to be distributed or parted with until further order;

(iii) that the petitioner to give the usual undertaking as to damages which the court may make if the court was of the opinion that the respondent company shall have sustained;

(iv) that the auction sale scheduled on 22 August 2001 or on such other date that may be fixed later against the assets of the respondent company be stayed pursuant to ss. 223 and 224 of the Companies Act 1965, and that the costs of the intended auction sale be paid by the provisional liquidator out of the respondent company's assets;

(v) that all further civil actions against the respondent company be stayed pursuant to s. 222 of the Companies Act 1965 pending the hearing of the winding-up petition;

(vi) that the costs of this application be taxed by the court and paid by the petitioner out of the assets of the respondent company; and

(vii) such further relief or order as the court deems fit.

In the affidavit in support of the application (encl. 4) the said Koh Kheng Min avers that "in carrying out his duties as the liquidator for the petitioner, he discovered from the account records that the respondent is indebted to the petitioner for the sum of RM18,133.68 being the "unpaid balance on goods sold and delivered and unpaid balance on services rendered and advanced". The said *ex parte* summons in chambers (encl. 3) was fixed for hearing *ex parte* on 20 August 2001. On that day (20 August 2001) an order interm of the *ex parte* summons in chambers was granted by the court. On 21 August

2001 the said *ex parte* order was served on the court bailiff. The said bailiff then cancelled the public auction of the movable goods of the respondent company scheduled to be held on 22 August 2001.

All the applicants (in the present proceedings) are judgment creditors against the respondent company, who at all material times, have been suppliers of goods and merchandise to the respondent company. They alleged that as at 30 May 2001 the respondent was indebted to the applicants in the sum of:

(i) RM79,932.21 – to the first applicant, Then Shak Liong;

(ii) RM40,705 – to the second applicant, Joo Huat Book Store Sdn. Bhd;

(iii) RM48,042.33 – to the third applicant, Joo Huat Stationary & Sports Trading.

being the balance of the price of goods sold and delivered to the respondent company.

The applicants discovered the respondent's emporium in Jerantut had been closed down and ceased business operation since May 2001. Thus, on 2 July 2001 the applicants filed their respective civil actions against the respondent company to recover the said sums respectively at the Temerloh Sessions Court. On the same day (2 July 2001), the applicants also filed their respective *ex parte* notice of application in the said civil actions praying for an order that all the movable good and property of the respondent company be attached by way of attachment before judgment, under s. 19 of the Debtors Act 1957, as a pledge to answer the just demand of the applicants, until the trial of the action and satisfaction of any judgment that may be made against the respondent company. An order in terms of the said *ex parte* applications was granted by the Sessions Court on 5 July 2001. Consequently, on 18 July 2001 the Temerloh Sessions Court Bailiff attached the movable properties and goods of the respondent company, at Jerantut, pursuant to the said order of attachment dated 5 July 2001. The Court Bailiff appointed public auctioneers and proceeded to proclaim the sale of the movable goods to attached: The public auction was to be held on 22 August 2001. On 17 August 2001 the said applicants obtained judgment in default of appearance against the respondent company. However, on the morning of 22 August 2001 the applicants were informed by the court bailiff that the said public auction had to be cancelled by reason of the *ex parte*-order of this court obtained by the petitioner as earlier stated.

The Present Applications

All the said applicants/judgment creditors being aggrieved and affected by the said *ex parte* order of this court dated 20 August 2001 obtained by the petitioner are now applying to set aside the said *ex parte* order *vide* summonses in chambers in encls. 14, 18 and 22, supported by their respective affidavits as in encls. 15, 19 and 23. All the three applications are the same in nature where the applicants apply for the following orders:

(1) the applicant/judgment creditor therein, be at liberty to proceed with this application and obtain the orders and or reliefs and or directions prayed for in this application therein;

(2) pursuant to r. 193 of the Companies (Winding-Up) Rules 1972, the Honourable Court hereby abridge the time appointed and/or fixed by r. 7(2) of the Companies (Winding-Up) Rules 1972 for the filing and/or service of any document or otherwise and/or taking any proceeding herein;

(3) pursuant to s. 222 of the Companies Act 1965 and or pursuant to s. 25(2) read with para. 6 of the schedule to Courts of Judicature Act 1964, the enforcement and or the execution of and/or all further proceedings to enforce and or to give effect to and or in relation to the order dated 20 August 2001, appointing Koh Kheng Min as the provisional liquidator of the respondent therein, and all other or further proceedings in this action or proceeding or petition be stayed or restrained until the final disposal of this application or until furthcr order by this Honourable Court;

(4) the order dated 20 August 2001 (encl. 11) appointing Koh Kheng Min as the provisional liquidator of the respondent therein be forthwith set aside;

(5) the said Koh Kheng Min be forthwith removed as provisional liquidator of the respondent therein;

(6) the public auction of the respondents' moveable goods and property at the respondents' premises scheduled to be held on 22 August 2001 but aborted by reason of the said order of court dated 20 August 2001, be held within seven days from the date of the order to be made hereon, and the bailiff of the court be directed accordingly to carry out of the said auction to proceed with the public auction;

(7) an enquiry be held by the deputy registrar to assess the damages resulting from the appointment of the said Koh Kheng Min as the provisional liquidator of the respondent herein and in the staying of the said public auction scheduled to be held on 22 August 2001, and such damages so assessed be paid by the said Koh Kheng Min to the said applicant, the Bailiff and the auctioneer herein forthwith;

(8) the cost of this application and or of the petition herein be paid by the said Koh Kheng Min to the said applicant herein forthwith;

(9) such further or other reliefs or directions which this Honourable Court deems fit;

The applications are made under ss. 222, 226(3), 232, 297, 298 and 299 of the Companies Act 1965, and rr. 5(2), 7(2), 11 and 193 of the Companies (Winding-up) Rules 1972, and s. 25(2) read with para. 6 of the schedule to the Courts of Judicature Act 1964 and also under the inherent jurisdiction of the court.

Contentions Of The Applicants

All the applicants contended that the said *ex parte* order obtained by the petitioner dated 20 August 2001 is a nullity on procedural grounds and also the said order cannot be sustained on merits. The applicants submitted that on the following procedural grounds the petitioner's petition and the said *ex parte* order dated 20 August 2001 are a nullity and ought to be struck out and set aside:

(a) there is no proper, valid and effective petition before the court to wind up the respondent company;

(b) the petition now before the court is a nullity and consequently all subsequent proceedings there under including the *ex parte* order dated 20 August 2001 is also a nullity;

(c) there is no provision in the Companies Act 1965 and/or in the Companies (Winding-Up) Rules 1972 for an *ex parte* application to be made; and

(d) that the affidavit in support by the liquidator (encl. 4) does not disclose material facts relevant to the case and the said liquidator is therefore guilty of failure to make a full and frank disclosure in his *ex parte* application.

On merit of the case, the applicants submitted that:

(a) the petitioner has not made out a case under ss. 217 and 218 of the Companies Act 1965 to present a winding up petition;

(b) that the applicants' attachment of the goods of the respondent on 18 July 2001 by the Court Bailiff pursuant to an order of the Sessions Court Temerloh dated 5 July 2001 is valid and that ss. 224 and 293 of the Companies Act 1965 are not applicable;

(c) that ss. 223, 224, 292, 293, 297, 298 and 299 of the Companies Act 1965 are not applicable to protect the petitioner.

***Locus Standi* Of The Petitioner And The Applicants**

The applicants are saying that the petitioner, being a company in liquidation is not a qualified person or entity to present a petition for winding-up and thus has no *locus standi* to do so. To support this argument, the applicants argued that only those persons or entities listed under s. 217(1) of the Companies Act 1965 are qualified to present a winding up petition. The petitioner is not a creditor under s. 217(1)(b) of the Act. The alleged debt by the respondent is not proved and thus the petitioner's status as a "creditor" is questionable.

On the other hand, the petitioner is saying that the applicants have no *locus standi* to apply to oppose the petition on the ground that an order for winding up of a company shall operate in favour of all the creditors and contributories of the company as if made on the joint petition of a creditor or of a contributory as provided under s. 226(4) of the Companies Act 1965. Therefore, the petitioner argued that the applicants are deemed to be joint petitioner to the petition and they cannot oppose the petition.

The first question for the court to consider and decide is whether the petitioner, in this case is a "creditor", in order to qualify to initiate a winding-up petition against the respondent under s. 217(1)(b) of the Act. If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order (see: *Jurupakat Sdn. Bhd. v. Kumpulan Good Earth (1973) Sdn. Bhd.* [1988] 1 CLJ 649; [1988] 1 CLJ (Rep) 618). In that situation the petitioner has no *locus standi* and the petition must fail. (See: *Mann & Anor. v. Goldstein & Anor.* [1968] 2 All ER 769). Where a petition is based on a debt which is seriously disputed on substantial grounds, the petitioner is not a creditor. (see: *Re Lympne Investment Ltd* [1972] 2 All ER 385).

The Supreme Court in *Morgan Guaranty Trust Co. of New York v. Lian Seng Properties Sdn. Bhd.* [1991] 1 MLJ 95, has followed the test suggested by Crossman J, in *Re North Bucks Furniture Depositories Ltd.* [1939] 2 All ER 549, namely, that a "creditor" include every person who has the right to prove in winding-up.

The word "creditor" is not defined in detail under the Companies Act 1965. Section 217(1)(b) of the Act only mention "any creditor, including a contigent or prospective creditor, of the company". In the popular mean of the word, "creditor" is a person or company to whom money is owing. Zakaria Yatim J in *Jurupakat*'s case *(supra)* has said that "a creditor is a person who could enforce his claim against the company by an action of debt." The claim or debt in question must not be in the form of unliquidated damages (see: *Pennington's Company Law,* (1985) 5th edn, p. 843). When we talk about

"contigent creditor", it simply means that a person who could enforce his claim by an action of debt where the claim or the right to enforce such claim can be anticipated to arise if a particular event occurs. The words "prospective creditor" refer to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future.

In the present case, the liquidator for the petitioner, in his affidavit in support (encl. 4) has deposed that "in carrying out his duties as the liquidator for the petitioner, he discovered from the account records that the respondent is indebted to the petitioner for a sum of RM18,133.68" being "unpaid balance on goods sold and delivered and unpaid balance on services rendered and advanced." A statement of accounts dated 31 July 2001 (exh. "KKM2" was sent to the board of directors of the respondent company requesting for payment "as soon as possible". There is also an instruction in the said statement of accounts to the effect that "any discrepancy in the statement must be reported to the petitioner in writing within ten days." Apparently, there was no payment made by the respondent company and also no report on any discrepancy in the statement made within the stipulated time. In other words, the respondent company had not disputed the amount owed, as claimed by the petitioner.

The applicants contended that the debt is being substantially disputed and thus, the petitioner is not a creditor for the purpose of s. 217(1)(b) of the Companies Act 1965. The applicants alleged that the substantial dispute on the debt is apparent from the two affidavits filed by the applicants.

It is well established that a petitioner cannot claim to be a creditor when the debt in question is seriously and substantially disputed, and thus cannot petition for winding up. There are string of authorities on this principle. Among them are: *Re Lympne Investments Ltd.* [1974] 2 All ER 385; *Re Nima Travel Sdn. Bhd*. [1986] 2 MLJ 374; *Mark Jaya Engineering Sdn. Bhd. v. LFY Construction Sdn. Bhd.* [1990] 1 CLJ 518; [1990] 2 CLJ (Rep) 451 and *Metal Reclamation (Industries) Sdn. Bhd. v. JRC Tenaga Sdn. Bhd.* [2000] 6 CLJ 290. In order for the principle to apply, the debt in question must be disputed by the company on some substantial ground and not just on some ground which is frivolous or without substance. The dispute must be based on solid grounds. If the dispute is on some ground which is frivolous or without substance, the court should ignore the dispute. (see: *Mann v. Goldstein* [1968] 1 WLR 1091 (at p. 1096). It has also been stressed by Lord Greene MR in *In re Welsh Brick Industries* [1946] 2 All ER 197 the dispute must be *bona fide* dispute. A *bona fide* dispute must be made with substance by the respondent company (ie, the debtor company itself). The person who disputes the debt must be the one who knows the background of the transactions which created the debt. In the present case, it must refer to the respondent company

who actually knew whether the debt is due or not; whether there's still "unpaid balance on goods sold and delivered and unpaid balance on services rendered and advanced." Any third party, including other creditors (as in the present case) would not be in the position to raise any *bona fide* dispute as to the debt. Here, there is no indication that the respondent company has disputed the debt at any time. The alleged dispute was only raised by the applicants, who are creditors to the respondent company, who have no knowledge about the events that led to the creation of the alleged debt.

The issue about the need for a *bona fide* dispute which must be based on solid grounds was touched by Megarry J in *Re Lympne Investments Ltd. (supra)* when at p. 388, he said:

> I need only say that on the evidence before me, it seems quite plain that there is a *bona fide* dispute whether there is any debt at all, and that this dispute is not trivial or insubstantial but is based on solid grounds.

In the present case, I am of the view that the dispute raised by the applicants (not the respondent company) is not *bona fide* and not based on solid grounds. Thus the dispute, to borrow the words by Ungoed – Thomas J in *Mann v. Goldstein (supra)*, "should be ignored by the court."

That being the case, I am also of the view that the petitioner qualifies to be a "creditor" for the purpose of s. 217(1)(b) of the Companies Act 1965 and has the necessary *locus standi* to petition for winding-up of the respondent company.

On the question whether the applicants have *locus standi* to oppose the petition, the applicants submitted that the *ex parte* summons-in-chambers filed by the petitioner specifically seeks an order that the public auction scheduled to be held on 22 August 2001 be stayed. This auction was scheduled to be held pursuant to attachment orders dated 5 July 2001 obtained by the applicants. Therefore, they argued that the applicants are person against whom the order to stay the auction is sought. They claimed to have the *locus standi* to oppose the petition and to apply to set aside the said *ex parte* order.

It is not disputed that the effect of the *ex parte* order obtained by the petitioner on 20 August 2001 is to stay the scheduled auction pursuant to attachment order obtained by the applicants from the Temerloh Sessions Court on 5 July 2001. It is also not disputed that if the winding-up petition against the respondent company is valid and successful, then the applicants' attempt to realise their respective debts from the respondent company will be hampered and they will not have priority in relation to the respondent's assets and properties. In the premise I am of the view that all the applicants have got

definite interest in the outcome or the decision of the court in this proceeding. They have interest on the subject matter of the winding-up and in my view they have *locus standi* to oppose the petition as well as to apply to set-aside the *ex parte* order obtained by the petitioner on 20 August 2001. In *Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn. Bhd.* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 Abu Mansor J has also held that an objector who had an interest in the subject matter of the winding-up petition has *locus standi* in the proceeding.

Verification Of Petition – Rule 26 Of The Companies (Winding-Up) Rules 1972

The applicants submitted that the petition filed by the petitioner is a nullity for failure to comply with r. 26 of the Winding-Up Rules 1972. They further submitted that the said defect is substantial and cannot be cured under s. 221 of the Companies Act 1965 or r. 194 of the Winding-Up Rules 1972.

Rule 26 requires that every petition for the winding-up of a company by the court shall be verified by an affidavit, as in Form 7, made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be *prima facie* evidence of the statements in the petition.

In the present case the relevant affidavit verifying the petition (encl. 11) was sworn by the liquidator of the petitioner (duly appointed by the court on 10 August 2001). Section 236(2)(a) of the Companies Act 1965 clearly empowers the liquidator to bring or defend any action or other legal proceeding in the name and on behalf of the company (the petitioner). For that purpose, the said liquidator is empowered to sign all documents and to affirm all affidavits for and on behalf of the petitioner relating to the legal proceeding. The said affidavit was sworn on 21 August 2001 and was filed and received by the High Court registry on 22 August 2001. The petition (encl. 5) was presented and filed on 17 August 2001.

Clearly, the said affidavit was sworn **after** the presentation of the petition. However, it was filed on the 5th day **after** the presentation of the petition. Rule 26 requires that it must be filed within four days after the presentation of the petition. Obviously, it was filed one day outside the prescribed time. I think this is a proper case for the court to exercise it's discretion under r. 193 which reads:

> The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding.

One day delay is not serious. No substantial injustice has been caused to other parties. In *Re The East Cambrian Gold Mining Co* 12 LTR NS 507 and *Re The London and Westminster Co-operative Store Co.* 17 LTR NS 559, the court granted enlargement of time to file the affidavit verifying the petition for winding-up. In the first case, the affidavit was filed a few days after the 4th day; while in the second case, it was filed on the 5th day. However in *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173, Syed Othman J has rejected the same affidavit on the ground that the delay was too long a period ie, from 17 May 1977 to 19 March 1978.

Further more the one-day delay, at most, can only be considered as an irregularity which can be cured under r. 194(1) which says:

> (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

Ex parte Application's To Appoint Provisional Liquidator

The applicants also contended that the *ex parte* order obtained by the petitioner on 20 August 2001 is a nullity on the ground that there is no provision in the Companies Act or the Rules for the liquidator to move the court *ex parte* to appoint a provisional liquidator.

With respect, I cannot agree with the above contention. Section 231 of the Companies Act 1965 clearly empowers the court to appoint the official receiver or an approved liquidator provisionally at any time after the presentation of a winding-up petition and before the making of a winding-up order and the provisional liquidator shall have and may exercise all the functions and powers of a liquidator subject to such limitations and restrictions as may be prescribed by the rules or as the court may specify in the order appointing him. There are also numerous authorities which show that an application for appointment of provisional liquidator can be made *ex parte* after the presentation of the petition. In *South Downs Packers Pty. Ltd. v. Beaver* [1984] 8 ACLR 990, Mc Pherson J has said, at p. 994, that an application for appointment of a provisional liquidator can be made in the case of insolvent company without notice to the company *(ex parte)* in cases of pressing urgency. He went to say that there should be cogent evidence that the delay involved in affecting service, or at least giving notice, of the application, or the very fact of notice itself, is likely to be such as to defeat the purpose of appointing a provisional

liquidator. Sir Robert Megarry VC in the case of *Re Highfield Commodities Ltd.* [1985] 1 WLR 149 has also indicated that a provisional liquidator may be appointed *ex parte* subject to an undertaking in damages be provided by the applicant. In *Kong Long Huat Chemicals Sdn. Bhd. v. Raylee Industries Sdn. Bhd.* [1998] 5 CLJ 310, Abdul Malik Ishak J has also held (at p. 325) that:

> It is a correct statement of law to say and I so say that on an *ex parte* application, the applicant will be required to undertake and give an undertaking that if no order is made, he will compensate the company for any damages that may flow from the appointment.

The same type of *ex parte* application to appoint a provisional liquidator was also entertained by the court, by way of its inherent jurisdiction, in *Re Lo Siong Fong* [1994] 2 MLJ 72 and *Kok Fook Sang v. Juta Villa (M) Sdn. Bhd.* [1997] 2 CLJ 116.

In the present case, there are *prima facie* evidence in the affidavit-in-support (encl. 4) of the application to show the urgency of the matter. Basically, the *ex parte* application by the petitioner was for the purpose of appointing a provisional liquidator of the respondent company; for the provisional liquidator to take possession, control and protect the assets or realise the assets of the respondent and such assets are not to be distributed or parted with until further order; for the auction sale scheduled on 22 August 2001 be stayed pursuant to ss. 223 and 224 of the Companies Act 1965. The affidavit of the petitioner shows that several creditors of the respondent (ie, the applicants in the present applications) had begun attachment before judgment proceedings against the respondent and had obtained the relevant order from the Temerloh Sessions Court. The petitioner obtained this information on 14 August 2001. It was further informed that the bailiff of the Temerloh Sessions Court had taken possession and attached the respondent's business premises at Wisma Emporium Jaya, Jalan Kuantan, 27000 Jerantut, Pahang. The auction had been fixed on 22 August 2001. There are more unsecured creditors than that were listed in the proclaimation of sale. Therefore, the appointment of a provisional liquidator is necessary to prevent undue preference among the creditors and to prevent unfair distribution of the respondent's assets. It is also to prevent multiplicity of court proceedings and to save judicial time and costs.

The application was filed in court on 17 August 2001, together with a certificate of urgency. The application was fixed to be heard on 20 August 2001. The auction was scheduled to be held on 22 August 2001. In that circumstances, I am satisfied that there are cogent evidence to show that the delay in affecting service or giving notice of the application to all related parties, is likely to defeat the purpose of the application. By the time service is done, the auction could have been completed and the purpose of the application would be fully frustrated.

Further more, the petitioner has given the usual undertaking in damages which the court may make if the court was of the opinion that the respondent company shall have sustained (see: para. (c) of the summons-in-chambers).

That being the case, the said *ex parte* application by the petitioner (encl. 3) need not be served on the respondent as well as on every person against whom the order is sought as required under r. 7(2) of the Companies (Winding-Up) Rules 1972.

Non-Disclosure Of Material Facts

The applicants also submitted that the *ex parte* order should be set aside on the ground that the affidavit of the liquidator (encl. 4) in support of the *ex parte* application by the petitioner does not disclose material facts relevant to the case. The so-called "material facts" which were not disclosed in the affidavit are as follows:

(a) that he (Koh Khong Min) was appointed liquidator by Megah Supermarket & Departmental Store Sdn. Bhd. against Emporium Jaya (Bentong) Sdn. Bhd. in Petition No: 28-3 of 2001 on 10 August 2001;

(b) that he had conversation at Johore Bharu on 14 August 2001 with the solicitors for the applicants who had attached the goods of the respondent on 18 July 2001 to be auctioned on 22 August 2001;

(c) that he had written the letter to the solicitors representing the applicants who attached the goods of Emporium Jaya (Jerantut) Sdn. Bhd.,

(d) all the audited accounts of the petitioner in liquidation for whom he was appointed as the liquidator;

(e) that the said Megah Supermarket & Departmental Store Sdn. Bhd. has been at all material times negotiating with him as such liquidator for the purchase enbloc the Emporium Jaya chain from him;

(f) a list of all the unsecured creditors to support his application to appoint himself as the provisional liquidator; and

(g) that all the Emporiums at Jerantut, Kuala Lipis, Raub and Bentong have ceased business and were shut down.

The basic principle of law applicable on this issue is that the failure of the petitioner to make a full and frank disclosure of all relevant or material facts in their *ex parte* application, would empower the court to set aside the *ex parte* order. (see: *Kong Long Huat Chemicals Sdn. Bhd. v. Raylee Industries Sdn. Bhd. (supra)*. In *R v. Kensington Income Tax Commissioner, ex parte Princes Polignac* [1917] 1 KB 486, it was held that the rule requiring full and frank

disclosure of material facts applies in *ex parte* applications and the applicant who fails to do so will be deprived of the benefits of the order without going into the merits. The Supreme Court of Queensland had occasion to consider non-disclosure of material facts in the application for an appointment of provisional liquidator in *South Downs Packers Pty. Ltd. v. Beaver (supra).* In that case, Campbell CJ has this to say:

> The question was whether the several allegations of non-disclosure in the present case, read in the context of the other materials before the Master, were such as to lead to the conclusion that his Honour erred in not holding that the Master was thereby led or induced to appoint a provisional liquidator in the circumtances. Or, to put it in another way, did his Honour err in not finding that such non-disclosed facts were important to the Master in the formation of the latter's conclusion that the case was one for the appointment of a provisional liquidator.

Connolly J in the same case (with whose reasons Campbell CJ agreed) has said:

> the undisputed circumtances of the case warranted the appointment of a provisional liquidator. Not one of the allegations of non-disclosure touched or qualified in the slightest the essential facts. All were carefully considered by Mathews J who concluded that there had been no material non-disclosure.

In the present case before me, I have considered carefully all the so-called "undisclosed facts" alleged by the applicants and satisfied that they are not material and not relevant, in the context of the other materials before me, at the stage of the *ex parte* application by the petitioner. Such "undisclosed facts" are not really essential in determining the issue relating to an appointment of a provisional liquidator.

The petitioner's *ex parte* application was supported by it's liquidator's affidavit. All the material and relevant facts for consideration were there. I do not think there was any lack of full and frank disclosure. There is no question that the petitioner has suppressed the material evidence in its affidavit.

Statutory Notice Under Section 218(9)(a) Of The Companies Act 1965

The petition is based on s. 218(1)(e) and/or 218(1)(i) of the Act ie,:

(a) the respondent company is unable to pay it's debt; and/or

(b) it is just and equitable that the respondent company be wound-up.

The applicants contended that s. 218(1)(e) must be read together with s. 218(2)(a), (b) and (c) which defines "inability to pay it's debt". The applicants further contended that the statutory notice under s. 218(2)(a) to be issued and served on the respondent is a condition precedent which must be

complied with before the petitioner can rely on the presumption of inability to pay the respondent's debt, in its petition. Therefore, the applicants argued that, in the present case, there is no proper, valid or effective petition filed by the petitioner and thus, the *ex parte* order granted on 20 August 2001 is also invalid and must be set aside.

In order to invoke the ground under s. 218(1)(e) ie, the respondent is unable to pay its debt, the petitioner may choose to prove it by positive and direct evidence during the hearing of the petition that the respondent is insolvent and unable to pay its debt. Alternatively, the petitioner may rely on the statutory presumption provided under s. 218(2)(a), (b) or (c). Mc Pherson in the *Law of Company Liquidation*, 3rd edn, at p. 54, says "a creditor is entitled to adduce positive evidence in order to satisfy the court of the company's inability to pay its debt without resorting to either of the statutory presumptions". If the petitioner chooses to prove its case by positive and direct evidence during the hearing of the petition, the question of complying with the requirements under s. 218(2)(a), (b) or (c) does not arise. If the petitioner chooses to rely on the presumption under s. 218(2), the petitioner only need to rely on any one of the provisions (a), (b) or (c), not all the three. Section 218(2)(a), (b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound-up by the court on any one of the grounds in (a), (b) or (c). In this regard, I am in full agreement with Abu Mansor J, in *Teck Yow Brothers Hand-Bag Trading Company v. Maharani Supermarket Sdn. Bhd.* [1989] 1 CLJ 258; [1989] 2 CLJ (Rep) 555 when he ruled:

> As for the contention that no proper notice under s. 218(2)(a) of the Act has been given I find in this case that the notice is in the circumtances unnecessary and I order that it be dispensed with as the Petition is not wholly founded under s. 218(2)(a) of the Companies Act. I am of the view that s. 218(2)(a), (b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound-up by the court on any of the grounds (a), (b) or (c).

Section 218(2)(a), (b) and (c) provides:

> (2) A company shall be deemed to be unable to pay its debts if:
>
> (a) a creditor by assignment or otherwise to whom the companies is indebted in a sum exceeding five hundred ringgit then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorised requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatified in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts; and in determining whether a company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the company.

In the present case, there is no indication that the petitioner is relying on s. 218(2)(a). Therefore the question of the statutory notice under the section does not arise. Apparently, the petitioner is relying on s. 218(2)(b) and (c) to file its petition to wind-up the respondent company. The fact that the respondent company has ceased operation and all the applicants are judgment creditors to the respondent company and orders for attachment against the respondent was granted by the Temerloh Sessions Court and an auction had been fixed on 22 August 2001 clearly shows that there is a *prima facie* evidence, at the stage of filing the petition, that the company is unable to pay its debt under s. 218(2)(b) and (c).

The applicants also complained that the petition does not make specific reference either to s. 218(1)(e) or s. 218(1)(i) relying its petition. My understanding of this complaint is that the petitioner must choose and state specifically either one of the sections relied upon ie, either s. 218(1)(e) or 218(1)(i) but not both. I am of the view that in a petition, a petitioner may choose any one or more of the grounds for winding up as specified in the Companies Act 1965. There is nothing in the law to say that a petitioner can only rely on one ground but not more. *Halsbury's Law of Malaysia* – vol. 1, Civil Procedure, at para. 110.029 says:

> In his petition a petitioner must allege and prove the facts entitling him to present it, showing that **one or more of the ground specified** in the Companies Act 1965 for making a compulsory order exist. Unless these allegations are contained in the petition, it is misconceived and the court will dismiss it.

Therefore I find that the applicants' complaint on this issue is baseless and without merit.

Appointment Of A Provisional Liquidator

In the case of a winding-up proceeding by the court, s. 231 of the Companies Act 1965 provides for a provisional liquidator to be appointed. However, a court will not appoint a provisional liquidator consequent upon the presentation of a winding-up petition unless there is a good *prima facie* evidence that the company will be wound-up because the company is obviously insolvent, or the company's assets are in jeopardy, or it is just and equitable to wind-up

the company, or there are other circumtances which make it imperative for the court to intervene (see: *Re Highfield Commodities Ltd* [1984] 3 All ER 884). In determining whether a winding-up order will be made, for the purpose of appointing a provisional liquidator under s. 231 of the Act, the court should first look at the sufficiency of the allegations in the petition. The primary facts set out in the petition if assumed to be true and the uncontested evidence taken as a whole must add up to the conclusion that it is imperative that a winding-up order be made. (see: *Kok Fook Sang v. Juta Vila (M) Sdn. Bhd. (supra)*; and *Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd. & Ors.* [1996] 1 CLJ 393).

In the present case, I am convinced and satisfied that there are sufficient *prima facie* evidence to support an appointment of a provisional liquidator under s. 231 of the Companies Act 1965. The respondent company which has ceased operation since May 2001, is indebted to the petitioner in the sum of RM18,133.68. The applicants have obtained orders for attachment of the respondent's assets and properties from the Temerloh Sessions Court. The Bailiff had taken possession and attached the business premises of the respondent. The date for auction had been fixed on 22 August 2001. In the circumstances the petitioner verily believed that the respondent company is insolvent and is unable to pay its debt. The petitioner also believed that it is just and equitable that the respondent company be wound-up. In the present situation, the petitioner also verily believed that the winding-up of the respondent company ought to be granted for the benefit of all the creditors and its assets be distributed according to the law and no undue preference be created. The petitioner has reasons to believe that there are more unsecured creditors than that were listed in the proclaimation of sale and the appointment of a provisional liquidator shall prevent unfair distribution of the respondent's assets. In *Re Mc Lennan Holdings Pty. Ltd.* [1983] 7 ACLR 732, the Australian Court held that:

> after the due presentation of a petition to wind-up which discloses proper grounds for winding-up, the discretion to appoint a provisional liquidator is not limited.

In determining whether or not to appoint a provisional liquidator, the court must consider the degree of urgency, the balance of convenience and the need established by the petitioner. At this stage, I think it is useful to quote the passage from the 1975 judgment of Bright J of the Supreme Court of South Australia in *Re Clubs Mediterranean Pty. Ltd.* [1975] 1 SASR 481, at p. 484 that Mc Pherson on the *Law of Company Liquidation* (3rd edn) quotes at p. 100:

> Where the petitioning creditor makes the application and the company opposes it the Court must come to a conclusion as to the degree of urgency and of need established by the petitioning creditor and the balance of convenience. The circumstances will vary. Sometimes the company may be continuing to trade at a loss or to incur further liabilities. Sometimes assets may require to be protected from dissipation or from seizure or encumbrances.

In the present ease, the element of urgency in the petitioner application to appoint a provisional liquidator is real. The application was filed on 17 August 2001 and fixed for hearing, on a certificate of urgency, on 20 August 2001. Proclaimation of sale of the respondent's assets was issued and the date for public auction was fixed on 22 August 2001. The application was granted by this court on 20 August 2001 and the order was served on the relevant parties or their solicitors on 21 August 2001. In this case, the petitioner cannot effort to delay it's application even for another day. Time is really precious.

The need of the petitioner in making the application is that upon the appointment of the provisional liquidator, he shall take into possession of the movable assets as contained in the inventory list of the proclaimation of sale and also its immovable assets pursuant to s. 233 of the Companies Act 1965 so as to prevent unfair distribution of the assets among all the unsecured creditors and to avoid undue preference being created. When a provisional liquidator has been appointed, s. 233 of the Act empowers the provisional liquidator to take into his custody or under his control all the property and things in action to which the respondent company is or appear to be entitled. The auction sale scheduled on 22 August 2001 or on such other date that may be fixed later against the assets of the respondent's company need to be stayed pursuant to ss. 223 and 224 of the Companies Act 1965. Section 223 of the Act provides:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the Court shall unless the court otherwise orders be void.

Section 224 of the Act provides:

> Any attachment, sequestration, distress or execution in force against the estate of effects of the company after the commencement of the winding-up by the Court shall be void.

Under s. 219(2) of the Act, a winding-up shall be deemed to have commenced at the time of the presentation of the petition for winding-up. (see also: *Kredin Sdn. Bhd. v. Development and Commercial Bank Bhd.* (Court of Appeal) [1995] 4 CLJ 19).

The cut-off point for the purpose of ss. 223 and 224 of the Act is "after the commencement of the winding-up by the court" ie, at the time of the presentation of the petition for winding up, which in the present case is 17 August 2001. The applicants argued that the attachment on the respondent's assets was initiated by the Court Bailiff on 18 July 2001 pursuant to the said order of attachment dated 5 July 2001 granted by the Temerloh Sessions Court. This the applicants argued, was done **before (not after)** the presentation of the petition on 17 August 2001. However, the execution was not completed, in the sense that the sale of the assets was not yet implemented when the petition was presented. The sale of the assets was scheduled to take place on 22 August 2001, **after** the presentation of the petition. This is clearly a case of an uncompleted execution when the petition was presented.

It must first be stressed here that the requirement under s. 224 is clearly mandatory not only because the word "shall" is used in the section but also because, unlike s. 223 of the Act which provides, *inter alia*, that any disposition of the property of the company after the commencement of the winding-up by a court shall be void **unless the court order,** there is no such validating power given to the court to validate the things done under s. 224 of the Act.

In the present case, the said attachment and proclaimation of sale of the respondent's assets are in the nature of an execution of judgment or order the court. (ie, the Temerloh Sessions Court). In *In re Overseas Ariation Engineering (GB) Ltd.* [1963] 1 Ch. 24, Lord Denning observed that 'execution means, quite simply, the process of enforcing or giving effect to the judgment of the court.'

Therefore, I am satisfied that the applicants' attachment and execution process against the assets of the respondent company falls within the ambit of the s. 224 of the Act.

In *Pembinaan KSY Sdn. Bhd. v. Lian Seng Properties Sdn. Bhd.* [1991] 3 CLJ 1836; [1991] 3 CLJ (Rep) 415 Lim Beng Choon J has said:

> It is absolutely clear to me that the purpose of enacting s. 224 is to ensure that between the date of the presentation of a winding-up petition and the date of passing of the winding-up order the property of the company should not be dissipated to enrich one or more unsecured creditors at the expense of other unsecured creditors.

The court will not allow one creditor however diligent he may be to get on advantage over the others by getting in first with the attachment before judgment, knowing that the respondent has stopped its business operation and likely to be insolvent. (see: Lord Denning's speech at p. 1001 in *E. Pritchard v. Westminster Bank Ltd.* [1969] 1 All ER 999).

The question is whether s. 224 of the Act can be invoked in cases where execution has started **before** presentation of a petition but not completed when the petition is presented, as in the present case.

Unlike s. 298(2)(a) of the Act which provides *inter alia* that, for the purpose of that section, an execution against goods is completed by seizure and sale, there is no such provision under s. 224. However, the words "put in force ... after commencement" as used in s. 224 must be interpreted to mean that the said execution must have been fully effective and completed after the presentation of the petition. If the execution is still not completed (as in the present case) at the time of the presentation of the petition, then s. 224 can be invoked and further steps to complete the execution after the presentation of the petition must be avoided. In *Official Receiver v. J. Grigg* [1933] 7 FM SLR 48 (CA FMS), it was held that attachment proceedings are avoided if not completed by the sale before commencement of winding-up petition. Again, in *Supreme Holdings Ltd. v. The Sheriff, Supreme Court of Singapore* [1987] 1 MLJ 10, it was also held that as the seizure and sale was not completed before commencement of the petition, the execution creditors could not enjoy the benefit of the execution.

This interpretation is in line with the provisions of s. 298(2)(a) of the Act. Eventhough s. 298(2)(a) is only for the purpose of s. 298, but in interpreting s. 224 in relation to the same issue, it must be interpreted in line and consistent with s. 298, otherwise the basic purpose of s. 224 and s. 298 could not be achieved. Problem may arise if the applicants manage to escape s. 224 at this stage (if the interpretation to s. 224 differs from the above interpretation) but later when the respondent company is wound-up, they have to be caught by s. 298, because s. 298(1) provides "unless he has completed the execution or attachment before the date of the commencement of the winding-up" and s. 298(2)(a) clearly says that an execution against goods, for the purpose of that section, is completed by seizure and sale.

Another pertinent issue raised by the applicants in the present case is whether ss. 298(1)(c) and 299(3) of the Companies Act 1965 can be invoked by the court. Section 298(1)(c) provides:

> 298(1) Where a creditor has issued execution against the goods or land of a company, or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up, but:

(a)

(b)

(c) the rights conferred by this section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

Section 299(1) of the Act requires the Bailiff who has taken any goods of the company in execution and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, upon a notice is served on him that a provisional liquidator has been appointed (as in the present case), he shall on being so required deliver the goods and money seized or received to the liquidator. Section 299(3) also provides:

(3) The rights conferred by this section on the liquidator may be set aside by the court in favour of the Creditor to such extent and subject to such terms as the Court thinks fit.

The purpose of s. 298 is to empower the liquidator to recover any dissipation of the assets of the company which has been acquired by a creditor by way of an attachment or execution which has not been completed before the date of the commencement of the petition. This section is applicable when the assets of the company had been wrongly acquired by a creditor through an evasion of the prohibition set out in s. 224. In cases where the prohibition set out in s. 224 is fully and effectively applied, then s. 298 may not come into picture at the stage when a winding-up order is made by the court. In any event, s. 298 is only applicable when the company is wound-up, but not prior to that. In the present case, we have not reached that stage yet. Therefore, the provision of s. 298(1)(c) of the Act is not applicable and cannot be invoked by the court at this stage of the proceeding.

Section 299(3) is in *pari materia* with s. 298(1)(c). This provision, gives the court jurisdiction to do what is right and fair according to the circumtances of each case. (see *Armorduct Manufacturing Co. Ltd. v. General Incondescent Co. Ltd.* [1911] 2 KB 143; *Re Grosvenor Metal Co. Ltd.* [1949] 2 All ER 948; and *Re Suidair International Airways Ltd. (In Liquidation)* [1950] 2 All ER 920. However, it must be stressed here that this discretion must not be exercised if the effect is to defeat the basic scheme of the Companies Act 1965, ie, in cases where the company is insolvent the interest of creditors is paramount and in a winding-up unsecured creditors rank *pari passu* and that an execution creditor who has not completed his execution at the commencement of the winding up is for this purpose in the same position as any other unsecured creditor. (see *In re Redman (Builders) Ltd.* [1964] 1 WLR

541 (at p. 546). It was also held in *In re Redman (Builders) Ltd. (supra)* that the court is not bound to exercise the discretion in a manner which seems to be unjust and unreasonable.

In *Kumarasamy v. Haji Daud* [1972] 2 MLJ 16 Syed Othman J in dealing with the same s. 299(3) of the Companies Act 1965, held:

> The principle in this case can be put in this form. If a company which is in the process of winding-up is responsible for staying the hands of a judgment creditor in the matter of execution even in good faith then the rights of the liquidator will have to be set aside in favour of the judgment creditor.

In that case, s. 299(3) was invoked on the ground that all the indication showed that it was the liquidator, who, acting on his own, was responsible for staying a sale which the court has ordered.

Again in *Re Grosvenor Metal Co. Ltd. (supra)* the rights of the liquidator was set aside in favour of the execution creditors on the ground that the execution creditors were persuaded, induced or requested by the company to stay their hands in the matter of the execution. If not for their requests and the pressure the company put on the execution creditors, the execution would have been completed before the commencement of the winding-up petition.

Back to the present case, there is no indication at all to show that the respondent company or the liquidator has any hand to play that has resulted in the execution not being completed at the commencement of the petition. There is no sufficient evidence to help this court to invoke s. 299(3) of the Act in favour of the applicants. In fact I am satisfied that, it would be unjust and unreasonable in the present circumtances, for the court to invoke that section in favour of the applicants, at the expense of the other unsecured creditors. To do so is contrary to the basic scheme of the Companies Act 1965 which I have mentioned earlier. It would be manifestiy unjust to the other creditors. The respondent company was insolvent at the material times. There are other trade creditors at bay. There appears to be no conceivable reason why one or two execution creditors which had not completed its execution should be preferred to the other creditors. Therefore, I am of the view that this is not a proper case for the court to exercise its discretion under s. 299(3) in favour of the applicants.

The *ex parte* order dated 20 August 2001 granted to the petitioner also include an order that all further civil actions against the respondent company shall be stayed pursuant to s. 222 of the Companies Act 1965 pending the hearing of the winding-up petition. This stay is really necessary to ensure that assets of the respondent company are distributed *pari passu* among the creditors by

avoiding a scramble to enforce claims. Further, it is the policy that all claims should generally be disposed of by the cheap summary procedure of proving a debt in the winding-up rather than by dissipating the assets in a multiplicity of suits. (see: *Chatib bin Kari v. Mosbert Bhd.* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 *Re Perdana Merchant Bankers Bhd.* [1997] 3 CLJ Supp 140). In any event, on a provisional liquidator being appointed, an automatic stay comes into effect by virtue of s. 226(3) of the Companies Act 1965, which says:

> (3) when a winding-up order has been made or provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
>
> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the court imposes.

On the issue of balance of convenience, the court has to see where justice lies. The court has to weigh the interest of all the parties concerned as well as the effect of the court order on them. If the petitioner's *ex parte* application is refused, the three applicants can proceed with their execution process and the scheduled auction sale may proceed on 22 August 2001. If that happens, the three applicants may be able to satisfy their respective claims as judgment creditors in their suits at the Temerloh Sessions Court, where judgment in default of appearance have been granted, at the expense of other unsecured creditors. In effect the applicants will get priority in satisfying their claim eventhough the respondent company was already insolvent at that time. The other unsecured creditors may be left with nothing, as at that material times, the respondent company is already insolvent. The basic scheme of the Companies Act 1965 is that, in a winding-up, unsecured creditors ranked *pari passu* and that an execution creditor who had not completed his execution at the commencement of the winding-up was for that purpose in the same position as any other unsecured creditor. All the relevant provisions under the Companies Act 1965 which I have cited earlier in this grounds of judgment, were enacted specially as a mean to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding-up to the date when the order for winding-up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors (see: *Kredin Sdn. Bhd v. Development and Commercial Bank Bhd. (supra)* – per Siti Norma Yaakob JCA).

In the present case, justice requires that the petitioner's *ex parte* application (encl. 3) should be granted, pending the disposal of the winding-up petition filed against the respondent company. To refuse the application would be manifestly unjust to the petitioner and the other unsecured creditors.

Conclusion

For the above reasons, the applicants' applications *vide* summonses-in-chambers (encls. 14, 18 and 22) are dismissed with costs. The *ex parte* order which was granted by this court on 20 August 2001 should stay until the disposal of the winding-up petition against the respondent company.